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No. 07-563

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IN THE

Supreme Court of the United States

PETRO-HUNT, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petro-Hunt, L.L.C. is a Delaware limited liability company and is wholly owned by the William Herbert Hunt Trust Estate, a Texas Trust. Neither Petro-Hunt, nor the parent trust, are publicly traded entities. Both are privately held.

Hunt Petroleum Corporation is incorporated in Delaware. It is a privately held company. Hunt Petroleum Corporation stock is not publicly traded.

Kingfisher Resources, Inc. is incorporated in Delaware. It is a privately held company. Kingfisher Resources, Inc. stock is not publicly traded.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT ..	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
I. The District Court's finding of fact that all the acreage is similarly situated to the *Nebo* 800 acres should not have been disturbed by the Fifth Circuit	1
II. The Government's promises to induce the sale found in *Nebo* are relevant.	4
III. The change in law exception to collateral estoppel does not apply where the parties are the same and the transactions are the same.	6
IV. The Fifth Circuit's rigid application of the panel rule, in the same case, deprives the plaintiffs of due process, or alternatively, this Court should exercise its supervisory power to achieve uniformity in the circuits.	11
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

Cases

Amoco Prod. Co. v. Sea Robin Pipeline Co.,
844 F.2d 1202 (5th Cir. 1988) 3

Arizona v. California,
460 U.S. 605 (1983) 4

Beverly Health & Rehab. Servs. v. NLRB,
317 F.3d 316 (D.C. Cir. 2003) 6

Brown v. Felsen,
442 U.S. 127 (1979) 4

Cent. Pines Land Co. v. United States,
274 F.3d 881 (5th Cir. 2001), *cert denied*,
537 U.S. 822 (2002) 10

Clearfield Trust Co. v. United States,
318 U.S. 363 (1943) 8

Disabled Am. Vets. v. Commissioner,
942 F.2d 309 (6th Cir. 1991) 6

Fla. Lime & Avocado Growers v. Paul,
373 U.S. 132 (1963) 2

Fountain v. Filson,
336 U.S. 681 (1949) 2

Cited Authorities

	Page
Grubb v. Public Utils. Comm'n, 281 U.S. 470 (1930)	4
Harris v. Sentry Title Co., 806 F.2d 1278 (5th Cir. 1987)	1, 11
Heiser v. Woodruff, 327 U.S. 726 (1946)	4
Matter of Multiponics, 622 F.2d 709 (5th Cir. 1980)	2
Mendenhall v. NTSB, 213 F.3d 464 (9th Cir. 2000)	11
N. Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429 (11th Cir. 1993)	6
Nevada v. United States, 463 U.S. 110 (1983)	4
Nilsen v. City of Moss Point, 701 F.2d 556 (1993)	3
O'Leary v. Liberty Mut. Life Ins. Co., 923 F.2d 1062 (3rd Cir. 1991)	6
Petro-Hunt, LLC v. United States, 365 F.3d 385 (5th Cir. 2004)	*passim*

Cited Authorities

Page

Petro-Hunt. L.L.C. v. United States,
179 F. Supp. 2d 669 (W.D. La. 2001) ..... *passim*

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 2

Richards v. Jefferson County,
517 U.S. 793 (1996) 4

S. Pac. R.R. Co. v. United States,
168 U.S. 1 (1897) 4, 6

Steen v. John Hancock Mut. Life Ins. Co.,
106 F.3d 904 (9th Cir. 1997) 6

Tahoe-Sierra Pres. Council v. Tahoe Reg'l. Planning Agency,
216 F.3d 764 (9th Cir. 2000) 11

United States v. 162.20 Acres of Land,
733 F.2d 377 (5th Cir. 1984) 1, 11

United States v. Allegheny County,
322 U.S. 174 (1944) 8

United States v. Hatter,
532 U.S. 557 (2001) 11

United States v. Little Lake Misere Land Co.,
412 U.S. 580 (1973) 8, 9, 10, 11

Cited Authorities

Page

United States v. Nebo Oil Co.,
90 F. Supp. 73 (W.D. La. 1950) ..... *passim*

United States v. Nebo Oil Co.,
190 F.2d 1003 (5th Cir. 1951) ..... *passim*

United States v. Stauffer Chem. Co.,
464 U.S. 165 (1984) 6

Statutes

La. Act 315 of 1940
(codified as La. Rev. Stat. § 31:149) 9, 10, 11

Migratory Bird Conservation Act,
16 U.S.C. § 715, *et. seq.* 9

Weeks Act, 1911, 36 Stat. 961
(codified as amended in scattered
sections of Title 16 U.S.C.) 7, 9, 10

Other Authorities

Restatement (Second) Judgments § 24 (2007) .. 3

Restatement (Second) of Judgments, § 28,
Cmt. (b) (1982) 6

Petitioners, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc. (hereinafter "Plaintiffs" or "Petitioners"), reply to the Brief of the United States in Opposition as follows.

The government's first "question" presented in its brief ignores the issues raised by the plaintiffs in their petition for *certiorari*. The second question presented by the government misses the point; that is, a number of Fifth Circuit cases have held no law of the case doctrine exists in the Fifth Circuit. *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1282 (5th Cir. 1987); *see also United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984).

I. The District Court's finding of fact that all the acreage is similarly situated to the *Nebo* 800 acres should not have been disturbed by the Fifth Circuit.

The government's protestations that the District Court's undisputed facts are "irrelevant" fail to disprove that which is clear from even a cursory review of the record below. The District Court found as undisputed material fact that the property at issue here was all "similarly situated." *Petro-Hunt, LLC v. United States*, 179 F. Supp. 2d 669, 681 (W.D. La. 2001). This finding of fact was relevant to whether *res judicata* applied. The Fifth Circuit rejected that finding of fact, and *sua sponte* found that all the property was "separate" and "distinct." *Petro-Hunt, LLC v. United* States, 365 F.3d 385, 386-397 (5th Cir. 2004) (*Petro-Hunt I)* This, too, is a finding of fact, but one which contradicts the undisputed facts found by the District Court, that all of the acreage that

was conveyed, along with the 800 acres from *United States v. Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951), in the same deed, was part of the same *transaction. Petro-Hunt, supra*, 179 F. Supp. 2d at 682. The District Court's undisputed findings of fact are presumptively correct. *See, e.g., Matter of Multiponics*, 622 F.2d 709 (5th Cir. 1980). That the Fifth Circuit engaged in fact finding is also apparent because its decision is dependant upon its finding that the property was "separate" and "distinct." It could not have reached the result it apparently sought without rejecting the District Court's findings.

The Fifth Circuit, in *Petro-Hunt I*, 365 F.3d 385 (5th Cir. 2004), reversed summary judgment, and, *sua sponte*, rendered judgment for the United States. Plaintiffs were, by this action, denied a hearing or a trial, or even a meaningful opportunity for argument. *See, e.g., Fountain v. Filson*, 336 U.S. 681 (1949); *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963). *See also Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982). The government makes the anomalous statement that "Petitioners never sought an opportunity to develop the record further. . . ." Opposition p. 13. Plaintiffs asked the District Court for a trial, the purpose of which was to "develop the record" and to resolve the facts.

The government mischaracterizes the *Nebo* 800 acres as one of the 96 mineral servitudes. Opposition p. 7. This 800 acres is not one of the servitudes, but only a part of one. The notion of 96 servitudes is not pertinent to the issues of *res judicata* or collateral estoppel, but only the issue of prescription for nonuse. In order for a servitude to be maintained by drilling or production, it

must be "contiguous." If the land is either not contiguous in fact, or if it is divided by roads, streams, rivers, etc., it is not "contiguous." Drilling or production is required on each of the servitudes in order to maintain the servitude. For example, if a 100 acre tract is divided by a river, then a well must be drilled on each side of the river to interrupt prescription as to the entire 100 acres. The Fifth Circuit's opinion incorrectly likens the 96 servitudes to 96 transactions. The government confused the Fifth Circuit and continues to try to lead this Court through a "Serbonian Bog" [1] of irrelevant Louisiana law in an attempt to confuse the Court as to the real issues. These mineral servitudes were not conveyed separately, but were created by the six identical deeds. The size of each servitude is not discernable from the deeds themselves, but must be divined by a Louisiana title lawyer, armed with information extrinsic to the deeds. The government ignores this fact and claims that "[b]ecause the rights to each servitude turned on distinct operative facts, *res judicata* did not bar claims concerning the 95 other servitudes." Opposition p. 8. However, the government does not say what these "operative facts" are or why they are important.

The Fifth Circuit's decision in *Petro-Hunt I*, 365 F.3d 385 (5th Cir. 2004) regarding *res judicata* and collateral estoppel is clearly erroneous. Even the government admits that "the United States acquired some of the other parcels in the . . . 'same transaction' as the 800 acre parcel in *Nebo Oil*." (Opposition p. 12.) *See, e.g., Nilsen v. City of Moss Point*, 701 F.2d 556 (1993); Restatement (2d) Judgments § 24 (2007).

1: *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1205 (5th Cir. 1988).

Prior precedent of this Court holds that when the remainder of similarly situated property is sought to be litigated, the result of the first case should control the second case if the parties are the same. *See, e.g., Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983); *Arizona v. California*, 460 U.S. 605, 620 (1983); *S. Pac. R.R. Co. v. United States*, 168 U.S. 1 (1897).

Further, *res judicata* applies, not only to matters actually litigated, but also as to all matters which could have been litigated. *Brown v. Felsen*, 442 U.S. 127 (1979); *Richards v. Jefferson County*, 517 U.S. 793 (1996); *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Grubb v. Public Utils. Comm'n*, 281 U.S. 470 (1930). The government provides no meaningful explanation as to why title to all the minerals was not litigated at once, but obviously it could have been. As explained in Plaintiffs' original Petition for *Certiorari*, the *Nebo* 800 acres was part of a 24,943.93 acre conveyance of the surface to the United States and part of a 37,532.13 acre conveyance of minerals to Good Pine. (*See* Petro-Hunt Pet. for *Cert.* pp. 22-23.) There is no logical reason to treat the 800 acres differently from the remainder of these conveyances.

II. The Government's promises to induce the sale found in *Nebo* are relevant.

The government argues (Opposition pp. 15-16) that the promises it made to induce the sale of the surface of the property to it are irrelevant. This is not true. Grant and Bodcaw conveyed the minerals to Good Pine Oil Company, which they (and several other companies) owned. The sale of the surface to the government would not have been made without the government's promises

that the minerals would not prescribe. This finding of fact was made by the *Nebo* Court. 90 F. Supp. at 89, 190 F.2d at 1005. If Grant and Bodcaw had kept the surface, the minerals would have prescribed to them. Because the government promised Bodcaw and Grant that the minerals would not prescribe, Grant and Bodcaw conveyed the surface to the United States, leaving Good Pine, they thought, as owner of the minerals for so long as the government held the surface.

The specific findings in *Nebo* belie the government's claim that "the United States and Bodcaw specifically intended prescription to apply to the outstanding mineral interests, specifically bargained over the reversionary interest and specifically made the reversionary interest itself subject to prescription." Opposition p. 16. The *Nebo* Court found that:

> The undisputed evidence in this case also establishes that at the time the United States purchased the land involved in this litigation, they did not expect or intend to acquire the mineral rights under the tracts purchased. Witnesses for the plaintiff testified that at the time the sale was made Bodcaw's officers had been advised by representatives of the United States that the prescriptive provisions of the Louisiana Civil Code did not apply to lands sold to the federal government.

90 F. Supp. at 89. The *Nebo* court found that "[b]oth Bodcaw and Grant were very interested in the preservation of Good Pines mineral rights. . . ." 90 F. Supp. at 79. Further, "[t]he value fixed to the lands

to be sold to the United States [by Bodcaw] did not include the minerals . . ." *Id.* These specific findings clearly defeat the government's claims.

III. The change in law exception to collateral estoppel does not apply where the parties are the same and the transactions are the same.

The change in the law exception to collateral estoppel, adopted by the Fifth Circuit, is contrary to the law expressed by this court in *S. Pac. R.R.*, *supra* and *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). This position cannot be reconciled with this Court's statements in *Stauffer*, 464 U.S. 165, 171 (1984), and Restatement (2d) of Judgments, § 28, Cmt. (b) (1982).

The Fifth Circuit adopted in *Petro-Hunt I* the same rule that the Third Circuit rejected in *O'Leary v. Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1067 (3rd Cir. 1991), and that several other circuits have rejected as well. *See, e.g., Steen v. John Hancock Mut. Ins. Co.*, 106 F.3d 904 (9th Cir. 1997); *Beverly Health & Rehab. Servs. v. NLRB*, 317 F.3d 316, 323 n.2 (D.C. Cir. 2003); *N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429, 435 (11th Cir. 1993); *Disabled Am. Vets. v. Commissioner*, 942 F.2d 309, 316 (6th Cir. 1991). *O'Leary* involved the same auto accident. This case involves the same transactions or deeds. *O'Leary* holds that if the transaction is the same and the parties are the same or privies, then the "change in the law" exception does not apply. 923 F.2d at 1069, 1070. *See also Stauffer, supra.*

The government erroneously claims that choice of law issues were not litigated in *Nebo*. The *Nebo* District Court made a determination as to which law, state or federal, should apply. The District Court, after discussion of the interplay of exclusive and concurrent jurisdiction, held:

> Where the United States has not acquired exclusive jurisdiction, or, stated conversely, where the United States and a state have concurrent jurisdiction, the Supreme Court has repeatedly upheld [application of] state legislation which does not interfere with the purposes for which the land was acquired by the United States.

Nebo Oil, 90 F. Supp. 73, 85 (W.D. La. 1950).

Having established that concurrent jurisdiction applied, the court found:

> Where the jurisdiction of the United States is *concurrent* with the jurisdiction of the state, however, as is the case where lands have been acquired under the Weeks Law, it is uniformly held that state statutes enacted after the land is acquired are applicable unless they interfere with the purpose for which the land was acquired by the United States. (Emphasis in original.)

90 F. Supp. at 88.

The issue of which law was to be applied was essential to the court's determination in *Nebo*. Regardless of the manner in which the government originally presented its choice-of-law argument, the District Court did make the choice-of-law analysis that the government maintains was never addressed. In its brief before the District Court in *Nebo Oil*, the government quoted from *United States v. Allegheny County*, 322 U.S. 174, 183 (1944), as follows:

> The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United Sates is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) . . . [other citations omitted].

Brief of the United States before the District Court in *Nebo Oil*, p. 10, filed February 24, 1950. Thus the government not only raised a choice-of-law issue in *Nebo*, but cited *Clearfield Trust* in furtherance of its position.

Stripping away the nomenclature given to issues in the cases, and examining what was actually decided by the *Nebo* court, and comparing that with what was actually decided by the Supreme Court in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), it

becomes quite evident that the two courts made the same analysis about the same issue. In *Nebo*, the court noted that the Weeks Act authorized the purchase of the property for the purposes of the National Forest, but specifically found, based on findings of the National Forest Reservation Commission, "that the Commission had repeatedly stated that the acquisition of lands subject to outstanding mineral rights did not interfere with the use of the lands for national forest purposes." The court further stated:

> In the present case, therefore, since the lands were acquired subject to the prior sale of oil, gas and sulfur to Good Pine Oil Company, the Commission and Secretary of Agriculture must necessarily have found that the ownership of the minerals by Good Pine Oil Company would not interfere with the use of the land for the purpose for which it was acquired.

90 F. Supp. at 86.

The *Nebo* court engaged in a factual analysis finding that application of state law, that is, Act 315 of 1940, was not inimical to the government's interests or purposes because it specifically found the government had not paid for the minerals, did not intend to acquire the minerals, and did not need the minerals for the purposes of the Weeks Act. *Nebo*, 90 F. Supp. at 90.

By comparison, this Court in *Little Lake* found that the application of Act 315 was adverse to a federal statutory scheme, the Migratory Bird Conservation Act, and that the application of the statute would be "hostile

to the interests of the United States." 412 U.S. at 597. The court found that application of Act 315 would deprive the government "of bargained for contractual interests." 412 U.S. at 600. Without attaching a label to the analysis conducted by either the *Nebo* court or the Supreme Court, when comparing the two analyses, it seems apparent that the two analyses are the same. An audible recitation of the *Nebo* finding tends to prove that this is so. If the Weeks Act did not require purchase of the minerals to fulfill its purpose, and the government did not intend to buy the minerals nor pay for the minerals, and had represented that it was not buying the minerals, then it seems obvious that Act 315 was not hostile to the interest of the government, nor did it deprive the government of any bargained for contractual interest. That the two courts reached different results does not mean the issue was not actually litigated in *Nebo*.[2]

According to *Petro-Hunt I*, the Fifth Circuit in *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), found *Nebo* did not decide the choice-of-law issue that the government now makes much ado about. However, the issue in *Central Pines* pertained to whether *Little Lake* overruled *Nebo*, and was not an analysis of what issues had been decided in *Nebo* for the application of collateral estoppel. Thus, for the purpose of deciding matters actually litigated for the purposes of collateral estoppel, the off-hand findings by the *Central Pines* court should be regarded as *dicta*, not to be relied on by the *Petro-Hunt I* panel for a collateral estoppel determination. Neither *Central Pines* nor the *Petro-Hunt I* panel conducted a thorough analysis as to what issues were actually litigated in *Nebo*.

2. As plaintiffs previously noted, this Court distinguished *Nebo* on its facts in *Little Lake*, 412 U.S. at 586 n.4.

IV. The Fifth Circuit's rigid application of the panel rule, in the same case, deprives the plaintiffs of due process, or alternatively, this Court should exercise its supervisory power to achieve uniformity in the circuits.

The issue is not, as the government avers, whether the Fifth Circuit correctly applied the "law of the case doctrine." *See* Opposition (I). "[T]he law of the case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by another panel even though it perceives error in the precedent." *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1282 (5th Cir. 1987); *see also United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984). Simply put, a number of Fifth Circuit cases such as *Harris*, say the Fifth Circuit has no law of the case doctrine. This is not in accord with other circuits. *See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l. Planning Agency*, 216 F.3d 764, 786 (9th Cir. 2000); *Mendenhall v. NTSB*, 213 F.3d 464, 469 n.3 (9th Cir. 2000).

"The law of the case doctrine presumes a hearing on the merits." *United States v. Hatter*, 532 U.S. 557, 566 (2001). The Fifth Circuit's holding in *Petro-Hunt I* did not involve a hearing on the merits. The fact finding by the District Court was limited to whether *res judicata* and collateral estoppel applied. Anything else discussed by the Fifth Circuit is necessarily *dicta*. If *res judicata* does only pertain to the 800 acres, then plaintiffs have not had an opportunity to be heard as to the rest of the 180,000 acres on the issue of whether, under the facts of this case, Act 315 is hostile to the interests of the United States as found on substantially different facts in *United States v. Little Lake Misere Land* Co., 412 U.S. 580 (1973).

CONCLUSION

This Court should grant Plaintiffs' Petition for *Certiorari*. The decision of the District Court was correct and should be reinstated, or alternatively, the decisions of the Fifth Circuit should be vacated and this case remanded for trial.

Respectfully submitted,

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